CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO.)

I.(a) PLAINTIFFS

Ifran Ali

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF _____
(EXCEPT IN U.S. PLAINTIFF CASES)

Santa Clara

DEFENDANTS

Anthony M. Aiello; Anthony S. Murry; Julie Myers; Michael Chertoff; Alberto Gonzales; Captain Mark Chandless

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Robert B. Jobe, Law Office of Robert B. Jobe, 550 Kearny St., Ste. 200, San Francisco, CA 94108 (415-956-5513)

ATTORNEYS (IF KNOWN)

US Attorney's Office, 450 Golden Gate, 11th Fl,, San Francisco, CA 94102

II. BASIS OF JURISDICTION (PLACE AN 'X' IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☑ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

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(For diversity cases only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐1	☐1	Incorporated *or* Principal Place of Business In This State	☐4	☐4
Citizen of Another State	☐2	☐2	Incorporated *and* Principal Place of Business In Another State	☐5	☐5
Citizen or Subject of a Foreign Country	☐3	☐3	Foreign Nation	☐6	☐6

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VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND $ _____ ☐ CHECK YES only if demanded in complaint: JURY DEMAND: ☐ YES ☑ NO

VIII. RELATED CASE(S) IF ANY PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2)
(PLACE AND "X" IN ONE BOX ONLY) ☑ SAN FRANCISCO/OAKLAND ☐ SAN JOSE

DATE 9/12/07 SIGNATURE OF ATTORNEY OF RECORD

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Attorneys for Petitioner,
Ifran Ali

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

C 07 4700 MMC

IFRAN ALI,

Petitioner,

v.

ANTHONY M. AIELLO, ASSISTANT FIELD OFFICE DIRECTOR, SAN FRANCISCO DISTRICT OFFICE, U.S. CUSTOMS AND IMMIGRATION ENFORCEMENT; ANTHONY S. MURRY, IMMIGRATION JUDGE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; JULIE MYERS, ASSISTANT SECRETARY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MICHAEL CHERTOFF, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; ALBERTO GONZALES, ATTORNEY GENERAL, UNITED STATES; CAPTAIN MARK CHANDLESS, WARDEN, YUBA COUNTY JAIL,

Respondents.

No.
DHS Alien Number: 70-149-531

PETITION FOR WRIT OF WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

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Petitioner, Ifran Ali ("Mr. Ali"), hereby petitions this Court for a writ of habeas corpus to remedy his unlawful detention by Respondents. In support of this petition, Mr. Ali alleges as follows:

INTRODUCTION

This petition for writ of habeas corpus concerns the proper scope of § 236(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(c), "commonly known as the INA's 'mandatory detention' provision." *Tijani v. Willis*, 430 F.3d 1241, 1244 (9th Cir. 2005) (Tashima, J., concurring). That provision directs "the Attorney General to "take into custody any alien who," *inter alia*, "***is deportable***" for having been convicted, at any time after admission, of two crimes involving moral turpitude ("CIMT"). (Emphasis added). Aliens who are subject to mandatory detention under § 1226(c) are ineligible for release during the pendency of their removal proceedings unless "certain strict conditions are met." *In re Rojas*, 23 I & N Dec. 117, 119 (BIA 2001), *citing* 8 U.S.C. § 1226(c)(2).

"[A] detainee who claims that he is not covered by § 1226(c)" is given a hearing at which he "may avoid mandatory detention by demonstrating that he . . . was not convicted of a predicate crime, or that the [government] is otherwise ***substantially unlikely*** to establish that he is in fact subject to mandatory detention." *Demore v. Kim*, 538 U.S. 510, 514 n.3, 523 n.6 (2003) (emphasis added); *see also* 8 C.F.R. § 1003.19(h)(2)(ii). In *In re Joseph*, 22 I & N Dec. 799 (BIA 1999), the Board of Immigration Appeals ("the BIA" or "the Board") held that the government's allegation that an alien "is deportable" for reasons that would justify mandatory detention is entitled to great deference and ***"the Immigration Judge must have very substantial grounds to override [the government's] decision to charge the alien with a ground that subjects the alien to [mandatory] detention."*** 22 I & N Dec. at 800 (emphasis added). "Thus," according to the BIA, an alien can avoid mandatory detention "***only*** when an Immigration Judge is convinced that [the government] is ***substantially unlikely to establish*** . . . the charge or charges that subject the alien to mandatory detention." *Id.* (emphasis added). If the alien carries that onerous burden, he does not win freedom from detention - merely a chance to prove that he

is worthy of release on bail because he poses no risk of fleeing his removal proceedings or of endangering the community.[1] That opportunity for an individualized bond hearing is all that Mr. Ali seeks here, but the government's unlawful practices have placed even that modest goal beyond reach.

By presuming that Mr. Ali "is deportable" on grounds that trigger mandatory detention unless and until ***he demonstrates*** that the government is "substantially unlikely" to establish that he is so deportable, the *Joseph* procedures violate the plain language of § 1226(c). Because "8 U.S.C. § 1226(c) tells the Attorney General to 'take into custody any alien who . . . ***is*** deportable,' not one who may nor may not fall into that category," "[o]nly those immigrants who could not raise a 'substantial' argument against removability [on grounds that would trigger § 1226(c)(1)] should be subject to mandatory detention." *Tijani*, 430 F.3d at 1247 (Tashima, J., concurring)(emphasis in original); *see also Demore*, 538 U.S. at 578-79 (Breyer, J., concurring and dissenting)("[A]s long as Kim's legal arguments are neither insubstantial nor interposed solely for purposes of delay . . . then the immigration statutes, interpreted in light of the Constitution permit Kim (if neither dangerous nor a flight risk) to obtain bail.") .

The *Joseph* standard also raises serious due-process concerns under a line of Supreme Court precedents requiring a standard of proof that favors the individual over the government in civil proceedings that threaten important liberty interests. *See, e.g., Woodby v. I.N.S.*, 385 U.S. 276 (1966) (concerning removal proceedings); *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (concerning proceedings to terminate parental rights). Instead of favoring the individual, the *Joseph* standard heavily favors the government, and in so doing, makes mandatory detention applicable even to those like Mr. Ali who raise substantial arguments against charges of

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[1] *See Joseph*, 22 I & N Dec. at 809 (A determination that an alien "is not properly included in a mandatory detention category . . . simply means that the alien could be considered by the Immigration Judge for release under the general bond provisions of section 236(a) of the Act," 8 U.S.C. § 1226(a)); *In re Guerra*, 24 I & N Dec. 37, 38 (BIA 2006)(In a custody re-determination hearing under INA § 236(a), 8 U.S.C. § 1226(a), the immigration judge must consider whether the alien presents a danger to persons or property, is a danger to national security, or poses a risk of flight.)

removability that would trigger mandatory detention.[2] To avoid these serious due process concerns and to give effect to the plain language of § 1226(c), which applies only in the case of an alien who "***is*** deportable" on grounds that trigger mandatory detention, the Court must interpret § 1226(c) as excluding those who have substantial arguments that they are not, in fact,

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[2] In *Demore*, the U.S. Supreme Court upheld the constitutionality of § 1226(c) as applied to an alien who ***conceded*** that he was deportable on grounds that subjected him to mandatory detention. The *Demore* Court did not address the constitutional adequacy of the *Joseph* procedures as a device for screening out aliens not subject to mandatory detention under § 1226(c) and, instead, repeatedly emphasized that Kim had "conceded that he was deportable because of a conviction that triggers § 1226(c) and thus [had] sought no *Joseph* hearing[.]" *Id.* at 514 n.3. *See also id.* at 522 (Kim did not "argue that he himself was not 'deportable' within the meaning of § 1226(c)."). "In conceding that he was deportable, [Kim] forwent a hearing at which he would have been entitled to raise any substantial argument available to demonstrate that he was not properly included in a mandatory detention category." *Id.* at 514. Thus, Kim "by his own choice did not receive one of the procedural protections otherwise provided to aliens detained under § 1226(c)." *Id.* at 523 n.6. Accordingly, the *Demore* Court had "no occasion to review the adequacy of *Joseph* hearings generally in screening out those who are improperly detained pursuant to § 1226(c)." *Id.* at 514 n.3.

Similarly, the Ninth Circuit has not determined the adequacy of the *Joseph* procedures. In *Tijani*, the Court avoided the constitutional issues implicated by the *Joseph* procedures by interpreting § 1226(c) as applying only to cases involving the "expedited removal of criminal aliens" who had "conceded deportability." Because the petitioner in that case contested DHS's charge of deportability and had been detained for 32 months, the Court ruled that his removal proceedings had not been "expeditious" and that "the authority conferred by § 1226(c)," therefore, could no longer justify his detention. *Id.* In a concurring opinion, Judge Tashima addressed the issue that the majority opinion avoided, i.e., the constitutionality of the *Joseph* procedures. After noting "that individual liberty is one of the most fundamental rights protected by the Constitution," Judge Tashima found that the *Joseph* decision "gives that right little or no weight." *Tijani*, 430 F.3d at 1244 (Tashima, J., concurring). "Instead, [the *Joseph* decision] establishes a system of 'detention by default' by placing the burden fully on the alien to prove that he should not be detained." *Id.* "When such a fundamental right is at stake," Judge Tashima noted, the Supreme Court has insisted on heightened procedural protections to guard against the erroneous deprivation of that right." *Id.* "In particular, the Supreme Court has time and again rejected laws that place on the individual the burden of protecting his or her fundamental rights." *Id.* "In light of [these precedents]," Judge Tashima opined, "the *Joseph* standard is not just unconstitutional, it is egregiously so" because it "not only places the burden on the [alien] to prove that he should not be physically detained, it makes that burden all but insurmountable." 430 F.3d at 1246 (Tashima, J., concurring). *See also* Bhargava, Shalina, "Detaining Due Process: The Need for Procedural Reform in "*Joseph*" Hearings After *Demore v. Kim*," 31 N.Y.U. Rev. L. & S. Change 51 (2006).

deportable because of a conviction that triggers mandatory detention.[3]

As shown below, Mr. Ali's claim that he is not deportable on grounds that would trigger mandatory detention is not only "substantial" but compelling. Accordingly, the Court must find that Mr. Ali is not subject to mandatory detention under INA § 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B), and that he is therefore immediately entitled to an individualized hearing to determine whether he should be released on a reasonable bond.

JURISDICTION

This Court has habeas corpus jurisdiction under 28 U.S.C. § 2241 to review the lawfulness of Mr. Ali's physical custody by the Department of Homeland Security ("DHS"). *INS v. St. Cyr*, 533 U.S. 289 (2001); *Demore v. Kim*, 538 U.S. 510 (2003). *See also Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2006)(noting that the Real ID Act of 2005 does not divest district courts of jurisdiction to entertain habeas petitions challenging an alien's custody rather than the merits of a final order of removal).

VENUE

Venue lies in the Northern District of California, where Mr. Ali is undergoing removal proceedings and where his custodian, Anthony M. Aiello is the Assistant Field Office Director for the Immigration and Customs Enforcement ("ICE") Detention & Removal unit of the San Francisco District Office, is employed and carries out his official duties. *See Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 493-94 (1973) (noting that venue

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[3] Under long-established principles of due process, the standard of proof employed in a government-initiated civil proceeding that threatens important liberty interests must be one that favors the individual over the government, thereby "reflect[ing] the value society places on individual liberty." *Santosky*, 455 U.S. at 756 (internal citations omitted). But the *Joseph* standard used in Mr. Ali's case does the exact opposite: it loads the scales overwhelmingly in the government's favor and results in the erroneous detention of aliens who - despite raising substantial arguments against removal - cannot meet *Joseph*'s onerous "substantially unlikely to prevail" standard. In such cases, the costs imposed by the *Joseph* standard are especially high, since those wrongfully detained are the aliens most likely to win release on bond and least likely to abscond or to take other actions that might jeopardize their success in the removal proceedings. For the same reasons, the government's interest in detaining those aliens is correspondingly weak.

considerations in a habeas proceeding include "where the material events took place; where records and witnesses pertinent to the petitioner's claim are likely to be found; [and] the convenience of the parties").

INTRADISTRICT ASSIGNMENT

Because a substantial portion of the events that gave rise to this lawsuit occurred in the County of San Francisco, this case should be assigned to the Court's San Francisco division. N.D. Rule 3-2(c) and (e).

PETITIONER

Mr. Ali is a native citizen of Fiji who has been in DHS custody since July 2007. He is currently being detained in the Yuba County Jail in Marysville, California.

RESPONDENTS

Anthony M. Aiello is the Assistant Field Office Director for the ICE Detention & Removal unit of the San Francisco District Office, which has jurisdiction over the Yuba County Jail in Marysville, California. Mr. Aiello has the power to release Mr. Ali and is, therefore, sued in his official capacity. *See Vasquez v. Reno*, 233 F.3d 688, 690 (1st Cir. 2000), *cert. denied*, 122 S.Ct. 43 (2001). *See also Roman v. Ashcroft*, 340 F.3d 314, 320 (6th Cir. 2003) ("[A]lthough the warden of each detention facility technically has day-to-day control over alien detainees, the INS District Director for the district where a detention facility is located 'has power over' alien habeas petitioners."); *Santiago v. U.S. I.N.S*, 134 F. Supp. 2d 1102, 1103 (N.D. Cal 2001).

Anthony S. Murry is the Immigration Judge presiding over Mr. Ali's bond proceedings in San Francisco, California.

Julie Myers is the Assistant Secretary of DHS's ICE division. ICE is the component within DHS that is responsible for the detention and removal of non-citizens. Ms. Myers leads the detention and removal functions of ICE and is sued in her official capacity.

Respondent Michael Chertoff is sued in hi s official capacity as the Secretary of the Department of Homeland Security. In this capacity he has responsibility for the administration and enforcement of the immigration laws.

Respondent Alberto Gonzales is sued in his official capacity, as the Attorney General of the United States, to the extent that 8 U.S.C. § 1103 gives him the authority to detain Mr. Ali and to interpret the law as it is applied by DHS and the U.S. Department of Justice.

Mark Chandless is the Warden of the Yuba County Jail in Marysville, California, where Mr. Ali is presently confined. As the individual with daily physical control over Mr. Ali, Mr. Chandless is a proper respondent to this petition and is sued in his official capacity as Mr. Ali's immediate custodian. *See Vasquez v. Reno*, 233 F.3d 688, 696 (1st Cir. 2000); *Yi v. Maugans*, 24 F.3d 500, 507 (3d Cir. 1994); *Kholyavskiy v. Ahim,* 443 F.3d 946 (7th Cir. 2006); *Robledo-Gonzalez v. Ashcroft*, 342 F.3d 667, 673 (7th Cir. 2003).

STATEMENT OF THE CASE

Mr. Ali is a native and citizen of Fiji who entered the United States 18 years ago, on March 13, 1989, with his parents as a tourist. Exh. 1 (*Notice to Appear*). He has resided in this country since that time. For nearly four years, he has been married to a United States citizen, Jevlin Roshima Ali. Exh. 2 (*Petition for Alien Relative*); 3 (*Marriage Certificate*). Mr. Ali and his wife have a seven year old son, Imraz, who is also a United States citizen. Exh. 4 (*Birth Certificate*).

Although married to a United States citizen and eligible to adjust his status to that of a lawful permanent resident under INA § 245(a), 8 U.S.C. § 1255(a), (see Exh. 5, *Notice of Approval of Relative Immigrant Visa Petition*), Mr. Ali is facing removal from the United States pursuant to INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B), as an alien who was admitted as a non-immigrant and remained longer than permitted. Exh. 1 (*Notice to Appear*). Although DHS never formally charged Mr. Ali with removability under INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) - as an alien who, after admission, has been convicted of two CIMTs – the IJ found that he "is deportable" and thus subject to mandatory detention pursuant to INA § 236(c)(2), 8 U.S.C. § 1226(c)(2).[4] Accordingly, the IJ denied Mr. Ali's request for an

[4] In a recent case, the BIA ruled "that the 'is deportable' language in the current mandatory custody statute does not require that the alien be charged with or found deportable on

individualized bond hearing and ordered that Mr. Ali be held in DHS custody throughout the pendency of his removal proceedings. Exh. 6 (*IJ's Memorandum and Order*, July 23, 2007). Although Mr. Ali appealed that determination to the BIA on August 8, 2007, his appeal remains pending before the BIA.

ARGUMENT

I. IN DETERMINING THAT MR. ALI IS SUBJECT TO MANDATORY DETENTION AS AN ALIEN WHO "IS DEPORTABLE" UNDER INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii), THE IJ APPLIED AN INCORRECT LEGAL STANDARD – i.e., THE *JOSEPH* STANDARD – AND VIOLATED MR. ALI'S FIFTH AMENDMENT RIGHT TO DUE PROCESS.

Mr. Ali is subject to mandatory detention under INA § 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B), only if he "is deportable" under INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii), as an alien who, after any time after admission, is convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct . . ."[5] In finding Mr. Ali subject to mandatory detention, the IJ noted that he has two criminal convictions. On September 13, 2000, Mr. Ali pled nolo contendere to a felony violation of Cal. Penal Code § 487(A)/508, Grand Theft by Embezzlement. Exh. 7 (*Criminal Docket Sheet, April 9, 2001*). He was sentenced to eight months in the San Mateo County Jail and 5 years probation, and was released after serving four months. *Id.* at 5; Exh. 8 (*Sheriff's Booking Info. Sheet*). In addition, on October 16, 2006, Mr. Ali pled guilty to a misdemeanor false personation in violation of Cal. Penal Code § 529(3).[6] Exh. 9 (*Criminal Docket Sheet, July 26, 2007*) at 1. For

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the particular ground on which detention is based." *In re Kotliar*, 24 I & N Dec. 124, 126 (BIA 2007). Rather, "[w]here the record reflects that an alien has committed any of the offenses" enumerated in the mandatory detention statute, "the alien is subject to mandatory detention pursuant to section 236(c)(1)(B) [8 U.S.C. § 1226(c)(1)(B)] as one who 'is deportable' for the offense, without regard to whether the Department of Homeland Security ("DHS") has exercised its prosecutorial discretion to lodge a charge based on the offense." *Id.*

[5] Although certain other grounds of deportability or inadmissibility can trigger mandatory detention, DHS has never argued that those grounds apply to Mr. Ali.

[6] The Criminal Compliant alleges that Mr. Ali "did wilfully and unlawfully and falsely personate Mohammed Shameer, in a private or official capacity and in such assumed character

that offense, he was sentenced to 45 days in county jail and two years probation.[7] *Id.* at 24.

Mr. Ali does not dispute that Grand Theft by Embezzlement in violation of Cal. Penal Code § 487(A)/508 is a CIMT. *See Rashtabadi v. INS*, 23 F.3d 1562, 1568 (9th Cir. 1994). Whether he "is deportable" under INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) and subject to mandatory detention thus turns on whether his second offense – misdemeanor false personation in violation of Cal. Penal Code § 529(3) – is also a CIMT. In concluding that Mr. Ali is subject to mandatory detention, the IJ found that misdemeanor false personation under § 529(3) "requires proof of a deliberate effort to defraud" and is therefore a CIMT. As explained below, that conclusion is patently incorrect. Before addressing that question, however, the Court should address the threshold question of whether the Board's *Joseph* decision erroneously places the burden on Mr. Ali to demonstrate that he is not, in fact, subject to deportation on grounds that would trigger mandatory detention.

A. The *Joseph* Standard – Which Allows an Alien to Avoid Mandatory Detention "Only" If He Can Convince the IJ That the Government Is Substantially Unlikely to Establish the Charge or Charges That Subject the Alien to Mandatory Detention – Violates the Plain Language of Section 1226(c) and Is Blatantly Unconstitutional.

Section 1226(c) plainly applies only to an alien who "is deportable" or inadmissible on certain grounds. Section 1226(c), however, does not define the phrase "is deportable." *Tijani*, 430 F.3d at 1243 (Tashima, J., concurring). "The implementing regulations also do little to help; they provide an alien with the opportunity to establish that he is 'not properly included' in the statute's reach, but they say nothing about what, precisely, the alien must show." *Id.*, *citing* 8 C.F.R. § 1003.19(h)(ii) (2005). In the *Joseph* case, the BIA attempted to fill the statutory and

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did an act whereby any benefit might accrue to the defendant, or to another, in violation of Penal Code section 529(3)." Exh. 10 (*Criminal Complaint*).

[7] Upon his release from jail on July 3, 2007, Mr. Ali was taken directly into custody by ICE officers. The government commenced removal proceedings against Mr. Ali with the issuance of a Notice to Appear, which alleges that Mr. Ali remained in the United States beyond March 4, 1989 (the expiration date of his original visa).

regulatory gap, ruling that the government's allegation that an alien "is deportable" for reasons that would justify mandatory detention is entitled to great deference and ***"the Immigration Judge must have very substantial grounds to override [the government's] decision to charge the alien with a ground that subjects the alien to [mandatory] detention."*** 22 I & N Dec. at 800 (emphasis added). According to the BIA, an alien can avoid mandatory detention "***only*** when an Immigration Judge is convinced that [the government] is ***substantially unlikely to establish*** . . . the charge or charges that subject the alien to mandatory detention." *Id.* (emphasis added).

The *Joseph* standard, however, is exactly the opposite of what due process requires. In civil proceedings that threaten important liberty interests, due process requires a standard of proof that is not only *less* favorable to the government than the *Joseph* standard, but one that is ***explicitly favorable to the individual.*** *See Chaunt v. United States*, 364 U.S. 350, 353 (1960)(government can revoke a citizen's naturalization only if there is "clear, unequivocal, and convincing" evidence that an individual obtained his citizenship illegally); *Woodby v. I.N.S.*, 385 U.S. 276 (1966)(alien can be deported only if deportability is established by clear, unequivocal and convincing evidence).

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333. Where an alien's due-process liberty interests are at stake, courts employ the three-part *Mathews* test for determining what procedural protections are constitutionally mandated. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1160-61 (9th Cir. 2004). That test requires the Court to consider: (1) the private interests that will be affected by the official action; (2) the risk of an erroneous deprivation of those interests through the procedures used; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 1161 (*citing Mathews*, 424 U.S. at 335).

In conducting the *Mathews* analysis, this Court must be mindful of the fact that when a "fundamental right is at stake . . . the Supreme Court has insisted on heightened procedural protections to guard against the erroneous deprivation of that right. In particular, the Supreme Court has time and again rejected laws that place on the individual the burden of protecting his or her fundamental rights." *Tijani*, 430 F.3d at 1244 (Tashima, J., concurring). In his concurring opinion in *Tijani*, Judge Tashima meticulously described this unbroken line of Supreme Court precedent. 430 F.3d at 1244-1246 (Tashima, J., concurring).

In *Addington v. Texas*, 441 U.S. 418 (1979), for example, the Court vacated a Texas Supreme Court ruling that a person could be civilly committed based upon a finding – by a mere preponderance of the evidence – of mental illness. *Id.* at 432-33. In so concluding, the Court described the "function of a standard of proof, as that concept is embodied in the Due Process Clause." *Id.* at 423. The Court explained that "a standard of proof" serves to allocate the risk of an erroneous decision among litigants based upon the competing rights and interests involved. *Id.* In a civil case where no fundamental rights are implicated, the interests involved are minor and "society has a minimal concern with the outcome;" consequently, the litigants share the risk of error roughly equally under the preponderance of the evidence standard. *Id.* In a criminal case, on the other hand, "the interests of the defendant are of such magnitude" that "our society imposes almost the entire risk of error upon itself" by insisting on the beyond a reasonable doubt standard. *Id.* at 423-24.[8]

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[8] Similarly, in *In re Winship*, 397 U.S. 358 (1970), the Supreme Court observed that "there is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake *an interest of transcending value* - as a criminal defendant his *liberty* - this margin of error is reduced as to him by the process of placing on the other party the burden of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt." *Id.* at 364 (emphases added) (quotation marks, ellipses, and citation omitted).

In his much-quoted *Winship* concurrence, Justice Harlan explained that identifying the constitutionally required standard of proof in any given proceeding reflects a "fundamental assessment of the comparative social costs of erroneous factual determinations." *Id.* at 369-70 (Harlan, J., concurring). Justice Harlan cited two principles in support of this contention. First,

Employing these principles, the Court held that there must be "clear and convincing evidence" of mental illness before an individual could be involuntarily committed and thus deprived of his liberty. *Id.* at 432-33. Noting that it "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection," *id.* at 425, the Court found it improper to ask "[t]he individual ... to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state," *id.* at 427. Thus, the Court concluded that "due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Id.* at 427.

As Judge Tashima noted in *Tijani*:

> Since *Addington*, the Supreme Court has repeatedly reaffirmed the principle that "due process places a heightened burden of proof on the State in civil proceedings in which

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standards of proof "communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions." *Id.* at 370. And second, it is inevitable that the factfinder will err, sometimes in favor of the prosecuting party, sometimes in favor of the defending party. By calibrating the "degree of confidence" that the factfinder should have in his conclusions, the standard of proof "influences the relative frequency of these two types of erroneous outcomes." *Id.* at 370-71. Therefore, the standard of proof should reflect "an assessment of the comparative social disutility of each" type of error. *Id.* at 371. For example, the preponderance of the evidence standard is "peculiarly appropriate" in a civil damages suit between private parties because in such cases, society regards it as "no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *Id.* at 371.

Justice Harlan's reasoning figured prominently in later Supreme Court decisions holding that due process requires an elevated proof standard when an individual's vital liberty or property interests are threatened by government-initiated civil proceedings. In such cases, the social disutility of erroneous findings against the individual far outweighs the social disutility of erroneous findings against the government. These cases teach that, "in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982). Thus, "[i]n cases involving individual rights, whether criminal or civil, the standard of proof at a minimum reflects the value society places on individual liberty." *Id.* at 756 (quotations, brackets, and citation omitted).

> the 'individual interests at stake ... are both particularly important and more substantial than mere loss of money.'" *Cooper v. Oklahoma,* 517 U.S. 348, 363 (1996) (quoting *Santosky v. Kramer,* 455 U.S. 745, 756 (1982)) (internal quotation marks omitted). In *Santosky,* for example, the Court considered a New York law that allowed the state to terminate parental rights upon proof of "permanent neglect" by a preponderance of the evidence. 455 U.S. at 747. Because the statute directly affected the "fundamental liberty interest of natural parents in the care, custody, and management of their child," *id.* at 753, the Court held that it needed to include greater procedural protection than the preponderance of the evidence standard. *Id.* at 769-70.
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> Again, in *Foucha v. Louisiana,* 504 U.S. 71 (1992), the Court found a statute unconstitutional that placed on civilly committed individuals the burden of proving that they were not a danger to the public before allowing their release. *Id.* at 73, 83. Noting that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," the court held that such a system failed adequately to protect the individual's liberty interest. *Id.* at 83 (quoting *United States v. Salerno,* 481 U.S. 739, 755 (1987)). Once again, because "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause," clear and convincing evidence was needed to civilly commit the individual. *Id.* at 80.
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> Finally, in *Cooper,* the Court unanimously rejected a state-law presumption that a defendant was competent to stand trial unless that defendant established his incompetence by clear and convincing evidence. 517 U.S. at 350. Stating that "we perceive no sound basis for allocating to the criminal defendant the large share of the risk which accompanies a clear and convincing evidence standard," the Court held that the Oklahoma law violated due process. *Id.* at 366.

Tijani, 430 F.3d at 1245 (Tashima, J., concurring).

With these precedents in mind, the Court must apply the *Mathews* factors to the BIA's decision in *Joseph*.

1. Affected Interest of the Individual.

The first prong of the *Mathews* analysis requires this Court to assess both the seriousness and the duration of the wrongful deprivation that might result from an erroneous determination in a *Joseph* hearing. "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Santosky*, 455 U.S. at 758 (citation and quotation marks omitted). Whether that loss is grave enough to warrant a heightened proof standard will therefore turn on "the nature of the private interest threatened" and "the permanency of the threatened loss." *Id.* Even where not permanent, the "possible *length* of wrongful deprivation" is an "important factor in assessing the impact of a challenged administrative practice. *Mathews*, 424 U.S. at 341-342 (emphasis added) (citation and quotation marks omitted) (discussing erroneous termination of social-security benefits). Thus, the

"torpidity" of the administrative review process may itself impose significant hardships that merit consideration under the first *Mathews* prong. *Id.*

Mr. Ali has a fundamental liberty interest in being free from indefinite bodily restraint. *See Zadvydas v. Davis,* 533 U.S. 678, 690 (2001)("Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty [the Due Process] Clause protects."); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). Because Mr. Ali is eligible for adjustment of status under INA § 245(a), 8 U.S.C. § 1255(a), and an accompanying waiver of inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h), it is likely that his removal proceedings will be protracted, enduring, at a minimum, many months. Indeed, by the time of his next hearing, December 13, 2007, Mr. Ali will have been detained for more than five months. Exh. 11 (*Declaration of Robert B. Jobe*). In the event of an appeal, Mr. Ali's proceedings will likely endure for well over a year. *Id.* Accordingly, the Court should find that Mr. Ali's interest in being free from bodily restraint during the pendency of these proceedings is of the most fundamental nature, and should be granted the highest level of due process available to anyone who is present in the United States.

2. Risk of Error and Probable Value of Additional Safeguards.

Under *Mathews* and its progeny, this Court "next must consider both the risk of erroneous deprivation of private interests resulting from use of [the *Joseph*] standard and the likelihood that a higher evidentiary standard would reduce that risk." *Santosky*, 455 U.S. at 761. Since a *Joseph* hearing is an "adversary contest" between the detainee and the government, "the relevant question is whether [the *Joseph*] standard fairly allocates the risk of an erroneous factfinding between these two parties." *Id.*

In this respect, "the *Joseph* standard is not just unconstitutional, it is egregiously so." *Tijani*, 430 F.3d at 1246 (Tashima, J., concurring). As noted above, the Supreme Court repeatedly has held that individuals, including aliens, may not be deprived of physical liberty or other important interests under any standard of proof less demanding than "clear and convincing evidence"; a

mere "preponderance of the evidence" standard will not do. *See, e.g., Chaunt*, 364 U.S. 350; *Woodby*, 385 U.S. 276; *Addington*, 441 U.S. 418; *Santosky*, 455 U.S. 745; *Foucha*, 504 U.S. 71.

Yet the *Joseph* standard subjects an alien to detention based on a standard of proof far *less* favorable to the alien than the preponderance of the evidence standard that the Supreme Court held *inadequate* in its standard of proof cases. Under *Joseph*, the alien must remain locked up unless *he* can prove that the government is "substantially unlikely to prevail" on any charge of removability that would implicate mandatory detention - which is tantamount to *inverting* the law's most demanding proof standard ("beyond a reasonable doubt") and deploying it *against* the individual whose physical liberty is at stake.

If the preponderance standard fails to pass constitutional muster in situations like this one, then, *a fortiori*, the *Joseph* standard cannot withstand the slightest constitutional scrutiny. Because it is so heavily skewed toward the government's side, the *Joseph* standard inevitably will result in the erroneous detention of many aliens who ultimately will be found not subject to mandatory detention, but who cannot carry the onerous burden of proving that the government is "substantially unlikely [to] prevail" in removal proceedings. Yet these are some of the aliens *least* likely to present a flight risk because they have a real hope of prevailing - and of thereby preserving their legal claims to remain - if they see their removal proceedings through to the end. Likewise, they are the aliens *most* likely to win release if granted an individualized bond hearing. Consequently, the Court must find that a higher evidentiary standard undoubtedly will render *Joseph* hearings more accurate than they presently are under the wildly skewed *Joseph* standard.

3. Governmental Interest And Potential Burden.

This prong *of Mathews* asks the Court to identify the governmental interests at stake in a *Joseph* hearing and to assess whether a standard of proof "more strict than" the *Joseph* standard is consistent with those interests. *Santosky*, 455 U.S. at 766.

The skewed nature and gross inaccuracy of the *Joseph* standard cannot be justified by simply citing the legislative purposes behind § 1226(c). According to the *Demore* decision, the statute has two such purposes: (1) "preventing deportable aliens from fleeing prior to or during their

removal proceedings, thus increasing the chance that, if ordered removed, [they] will be successfully removed," 538 U.S. at 528; and (2) preventing criminal aliens who remain in the United States from committing additional crimes before being removed. *Id.* at 518.

But those governmental interests are considerably less compelling here than they were in *Demore*. The alien in *Demore* had ***conceded*** deportability on grounds that subjected him to mandatory detention.[9] Mr. Ali's case is altogether different. He does *not* concede that he "is deportable" on a ground that would subject him to mandatory detention, and he is armed with sophisticated and substantial arguments against removal. Indeed, as explained below, California Supreme Court precedent strongly indicates that Mr. Ali's second conviction is not one involving moral turpitude. Moreover, Mr. Ali is immediately eligible to adjust his status to that of a lawful permanent resident (through an approved petition made by his wife). The fight to determine whether Mr. Ali should be awarded that discretionary form of relief, however, could take many months and, quite possibly, well over a year. Thus, the governmental interests that justified mandatory detention in Kim's case have a much weaker claim on Mr. Ali's freedoms. If due process "is not a technical conception with a fixed content unrelated to time, place and circumstances" - if indeed it is "flexible and calls for such procedural protections as the particular situation demands" - then the Court's *Mathews* analysis must take account of the important differences between an alien like Kim who concedes removability on grounds that would subject him to mandatory detention and one like Mr. Ali who does not. *Mathews*, 424 U.S. at 334 (citations and quotation marks omitted).

Moreover, Supreme Court precedent demonstrates that the policy concerns cited in *Demore*, in and of themselves, will not dictate the standard of proof required in a civil proceeding that

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[9] *See Demore*, 538 U.S. at 531 ("The INS detention of respondent, a criminal alien who has *conceded that he is deportable* . . . is governed by" cases upholding detention during removal proceedings) (emphasis added); *id.* at 523 n.6 ("As respondent has *conceded that he is deportable* for purposes of his habeas corpus challenge to § 1226(c) at all previous stages of this proceeding.... *we decide the case on that basis.")* (emphases added); *see also Gonzalez v. O'Connell*, 355 F.3d 1010, 1019 (7th Cir. 2004) (observing that *"Kim's* holding was expressly premised on" fact that Kim had conceded deportability).

threatens a serious deprivation of individual liberty. For example, in *Woodby*, the Court imposed a "clear, unequivocal, and convincing evidence" standard of proof even though Woodby admitted that, after being admitted to this country, she had engaged in prostitution - a crime then deemed sufficiently antisocial that Congress had designated it a deportable offense. *See* 385 U.S. at 280 n.5. In *Addington*, the Supreme Court imposed the "clear and convincing evidence" standard of proof even though the state maintained that Addington "suffered from serious delusions, that he often had threatened to injure both of his parents and others, that he had been involved in several assaultive episodes while hospitalized and that he had caused substantial property damage both at his own apartment and at his parents' home." 441 U.S. at 420-21. Each of these cases involved governmental interests that were compelling, or that were deemed to be so at the time that the Supreme Court imposed a heightened standard of proof. Yet none of those interests could override society's countervailing interest in fairly and appropriately allocating the risk of error in a civil proceeding that threatened a serious deprivation of individual liberty.

Finally, the administrative costs of adopting a higher standard of proof in *Joseph* hearings would be minimal. No new hearing or procedure would be required - merely the use of a different but hardly novel legal standard. Under Mr. Ali's standard, an alien is "not properly included" within the category of aliens subject to mandatory detention under § 1226(c), and therefore should be granted an individualized bond hearing, if he presents a substantial argument against any charge of removal that implicates mandatory detention. "[S]uch a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process." *Santosky*, 455 U.S. at 769.[10] Although Mr. Ali's proposal

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[10] Like Judge Tashima, Justice Breyer has suggested that an alien held in mandatory detention under § 1226(c) should be permitted to seek release on bail "so long as [his] legal arguments [against removal] are neither insubstantial nor interposed solely for purposes of delay[.]" *Demore*, 538 U.S. at 577 (Breyer, J., concurring in part and dissenting in part). And in *Gonzalez v. O'Connell*, 355 F.3d 1010 (7th Cir. 2004), the Seventh Circuit observed that *Kim* "left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes *a colorable claim* that he is not in fact deportable." *Id.* at 1019-20 (emphasis added).

favors the detainee, that is appropriate for at least two reasons. *First*, as we have seen, the Supreme Court has repeatedly tipped the scales in the individual's favor when "the individual interests at stake" in a civil proceeding "are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky*, 455 U.S. at 765 (citation omitted). *Second*, winning a *Joseph* hearing under Mr. Ali's standard will *not* hand the alien the keys to his detention cell. All it will do is qualify him for an individualized bond hearing at which he can try to persuade an immigration judge that he poses no risk of flight or danger to the community.

Thus, a proper *Mathews* analysis demonstrates that errors resulting in serious and potentially lengthy deprivations of physical liberty are made far more likely by use of the *Joseph* standard, and are not justified by any countervailing governmental interest in those who contest removal.

B. To Avoid the Serious Due Process Concerns Described Above, the Court Must Construe the Term "is Deportable" in § 1226(c) as Encompassing Only Those Aliens Who Have No Substantial Argument Against The Charges of Removability That Trigger Mandatory Detention.

"[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (citing *Murray v. The Charming Betsy*, 2 Cranch. 64, 118, 2 L. Ed. 208 (1804)). Indeed, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,' unless those saving constructions are "plainly contrary to the intent of Congress." *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (internal citation and quotation marks omitted).[11]

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[11] The constitutional-doubt doctrine often arises in cases challenging an executive agency's statutory interpretation, as embodied in a regulation or agency adjudication. In such cases, the doctrine of constitutional doubt takes precedence over the familiar *Chevron* doctrine of judicial deference to reasonable agency interpretations. *See DeBartolo*, 485 U.S. at 574; *cf. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984). As the Ninth Circuit observed, "*Chevron* deference is limited by the reasonableness of the agency's interpretation, and we must attempt to preserve the statute's constitutionality even if such a reading conflicts with the agency's interpretation." *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1162 (9th Cir. 2004). The same principles of course apply to agency interpretations of the INA. Thus, the Supreme Court has "read significant limitations into ... immigration statutes in order to avoid their constitutional invalidation." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

Thus, the Court must construe § 1226(c) to avoid the serious constitutional concerns described above. Fortunately, however, a saving construction is readily available and actually appears to be compelled by the plain language of § 1226(c). As Judge Tashima noted in *Tijani*, "8 U.S.C. § 1226(c) tells the Attorney General to 'take into custody any alien who . . . ***is*** deportable,' not one who may nor may not, fall into that category." *Tijani*, 430 F.3d at 1247 (Tashima, J., concurring)(emphasis in original). Thus, "[o]nly those immigrants who could not raise a 'substantial' argument against removability [on grounds that would trigger § 1226(c)(1)] should be subject to mandatory detention." *Id.*

II. MR. ALI'S ARGUMENT AGAINST HIS DEPORTABILITY UNDER INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii), IS NOT ONLY SUBSTANTIAL BUT COMPELLING.

Mr. Ali is subject to mandatory detention under INA § 236(c)(2)(B), 8 U.S.C. § 1226(c)(2)(B), only if he "is deportable" as an alien who has been convicted of two CIMTs, In finding that Mr. Ali is so deportable, the IJ expressly found that Mr. Ali's misdemeanor conviction for false personation constitutes a CIMT. Exh. 6 (*IJ's Memorandum and Order, July 23rd, 2007*)("Because section 529.3 requires proof of a deliberate effort to defraud, the court finds that it s a crime of moral turpitude. [Mr. Ali] therefore stands convicted of two crimes of moral turpitude and is subject to mandatory detention.). In doing so, the IJ unquestionably erred.

The touchstone of a crime involving moral turpitude is an evil intent. *See Goldeshtein v. INS*, 8 F.3d 645, 647 (9th Cir. 1993)(The determination of whether a crime involves moral turpitude "turns on whether evil intent . . . . is an essential element of the crime."). "A crime that does not necessarily involve evil intent, such as intent to defraud, is not necessarily a crime involving moral turpitude." *Hirsch v. INS*, 308 F.2d 562, 567 (9th Cir. 1962). In determining whether a crime involves moral turpitude, the Court must apply the two-step "categorical" approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990). *See Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159,1163 (9th Cir. 2006), *citing Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017 (9th Cir. 2005). Under the categorical approach, the Court first must "make a categorical comparison of the elements of the statute of conviction to the generic definition [of a

"crime involving moral turpitude"] and decide whether the conduct proscribed [by the state statute] is broader than, and so does not categorically fall within, this generic definition." *Huerta-Guevara v. Ashcroft,* 321 F.3d 883, 887 (9th Cir. 2003). Under this approach, "[t]he issue is not whether the actual conduct constitutes a crime involving moral turpitude, but rather, whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude." *Fernandez-Ruiz v. Gonzales*, 468 F.3d at 1163, *quoting Cuevas-Gaspar*, 430 F.3d at 1017.

If the statute of conviction is not a categorical match because it criminalizes both conduct that does and does not involve moral turpitude, the Court must apply a "modified" categorical approach "under which [it] may look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings," *Fernandez-Ruiz*, 468 F.3d at 1163-64, *quoting Tokatly v. Ashcroft,* 371 F.3d 613, 620 (9th Cir. 2004) (internal quotation marks omitted), to determine of Mr. Singh was in fact convicted of an offense that qualifies as a crime of moral turpitude. The Court may not, however, "look beyond the record of conviction itself to the particular facts underlying the conviction." *Cuevas-Gaspar,* 430 F.3d at 1020, *quoting Tokatly,* 371 F.3d at 620. *See also Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1058 (9th Cir. 2006).

In this case, the IJ did not resort to the modified categorical approach. Instead, the IJ noted that "crimes involving fraud are generally to be considered crimes of moral turpitude" and then opined that because false personation requires "proof of a deliberate effort to pass oneself off as another person," it necessarily and categorically involves moral turpitude. This is nonsense.

Cal. Penal Code § 529(3) provides:

> Every person who falsely personates another in either his private or official capacity, and in such assumed character . . . does any . . . act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person.

In *People v. Rathert*, 24 Cal.4th 200, 205-06 (2000), the Supreme Court of California described

the *mens rea* required under Cal. Penal Code § 529(3) as follows:

> Section 529, paragraph 3 does not explicitly require that a defendant who impersonates another specifically intend to cause the latter to become liable to any suit or prosecution or to pay any sum of money, or specifically intend to benefit defendant himself or another person. The Legislature included in paragraph 3 none of the language typically denoting specific intent, such as "with the intent that" or "for the purpose of." (See *People v. Hering, supra*, 20 Cal.4th at p. 446.) To the contrary, paragraph 3 is framed in language reasonably susceptible of only one interpretation: that the Legislature sought to deter and to punish all acts by an impersonator that might result in a liability or a benefit, whether or not such a consequence was intended or even foreseen. No fewer than seven times does the word "any" appear in the statute: "[*A*]*ny* other act ... in *any* event ... *any* suit or prosecution ... *any* sum of money ... *any* charge ... *any* benefit ... *any* other person." (§ 529, par. 3, italics added.) The impersonator's act, moreover, is criminal provided it *might* result in any such consequence; no higher degree of probability is required.

The IJ's suggestion that Cal. Penal Code § 529(3) is a "fraud" offense is way off base. The *sine qua non* of a fraud offense is "[a] knowing misrepresentation of the truth or concealment of a material fact *to induce another to act to his or her detriment*." Black's Law Dictionary (8th ed. 2004 at 685 (emphasis added). Cal. Penal Code § 529(3), however, does not require any specific intent to cause another person "to become liable to any suit or prosecution or to pay any sum of money, or specifically intend to benefit defendant himself or another person.." *Rat*hert, 24 Cal.4th at 205. Rather, "the Legislature sought to deter and to punish all acts by an impersonator that might result in a liability or a benefit, whether or not such a consequence was intended or even foreseen." *Id.* at 206. Moreover, the statute does not require commission of an act that will *likely* trigger a disability or benefit. To the contrary, "[t]he impersonator's act . . . is criminal provided it *might* result in any such consequence; no higher degree of probability is required." *Id.*

In light of the California Supreme Court's definitive interpretation of Cal. Penal Code § 529(3) and the Ninth Circuit's admonition that a categorical approach must be employed in determining whether a crime offense qualifies as a CIMT, the Court must conclude that Mr. Ali's contention that he is not deportable under INA § 237(a)(2)(a)(ii), 8 U.S.C. § 1227(a)(2)(a)(ii), is not only substantial but compelling. *See Notash v. Gonzales*, 427 F.3d 693, 698 (9th Cir. 2005)("Unlike Carty, where the statute of conviction explicitly required the intent to evade taxes, §542 does not require an intent to deprive the United States of revenue. Intent to defraud

accordingly is neither explicit nor implicit in the nature of the crime. We therefore disagree with the IJ's conclusion that a conviction under this paragraph categorically is a crime involving moral turpitude."); *Goldeshtein v. INS*, 8 F.3d 645, 649 (9th Cir. 1993) ("Goldeshtein did not obtain anything from the government by deceit, graft, trickery, or dishonest means." This is in contrast to cases where convictions have been held to be CIMTs which "all involve some false or deceitful conduct through which the alien obtained something from the government"); *cf. Winestock*, 576 F.2d at 235 (intent to defraud is inherent in the offense of dealing in counterfeit obligations because petitioner had "admitted intending to pass off something valueless as being something of value"); *Bisaillon v. Hogan*, 257 F.2d 435, 437 (9th Cir. 1958) (fraud was inherent where the statute "requires for conviction proof of a false statement, knowingly and willfully made, with intent to obtain the issuance of a passport contrary to law"), cert. denied, 358 U.S. 872 (1958); *United States ex rel. Popoff v. Reimer*, 79 F.2d 513, 515 (2d Cir.1935) (fraud is inherent in the offense of making false statements on behalf of an alien in order to allow the alien to obtain naturalization); *Matter of R-*, 5 I & N Dec. 29, 38 (BIA 1952) (fraud is inherent in a conviction for knowingly making a false statement for the purpose of evading military service because the defendant "attempted to deceive the Government through false representations for the purpose of obtaining an occupational deferment to which he was not entitled").

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CONCLUSION

For the foregoing reasons, the Court should find that Mr. Ali is not subject to mandatory detention. Accordingly, the Court should issue a writ of habeas corpus directing Respondents to immediately give Mr. Ali an individualized bond hearing or a *Joseph* hearing that comports with due process and the plain language of INA § 236(c), 8 U.S.C. § 1226(c).

Dated: September 12, 2007

Respectfully submitted,

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